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In the

Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities; THOMAS C. HORNE, Super. of Public Instruction,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act ("EEOA") because it was not adequately funding programs for teaching English to students. Since then, Arizona has implemented enormous funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act ("NLCB"). The district court has nonetheless refused to modify its eight-year-old injunction, imposing multi-million dollar penalties on the State until the Arizona Legislature further (and substantially) increases funding. Applying a standard that conflicts with decisions of this Court and the other courts of appeals, the Ninth Circuit affirmed, holding that Petitioners were not entitled to relief because (i) the named defendants support the injunction, and (ii) the injunction's "basic premises" have not been "swept away."

The questions presented are:

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with NCLB's extensive requirements for English-language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

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PETITION FOR A WRIT OF CERTIORARI

The Arizona Speaker of the House of Representatives and the President of the Arizona Senate respectfully petition for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Ninth Circuit.

This Court's guidance is needed to resolve a conflict between the decision below and decisions from other courts of appeals on a recurring issue of practical and constitutional importance: the proper standards for vacating or modifying a judicial decree in the context of institutional reform litigation. The Court's intervention is also needed to correct the Ninth Circuit's doctrinal departures from this Court's decisions, and its contravention of congressional intent by failing to give deference to the federal policy judgments embodied in the No Child Left Behind Act of 2001.

This case presents an appropriate vehicle for the Court to provide much-needed guidance on the federal judiciary's proper role in applying federal educational policies to local schools. The issue underlying this litigation—the Equal Educational Opportunity Act's mandate that States take "appropriate action" to overcome language barriers impeding students' equal participation in educational programs—is a recurring question of federal law. Schoolchildren requiring English-language instruction constitute the fastest-growing segment of the Nation's school-age population—currently accounting for some 19 percent of all school-age children. As a result, the decision below poses a serious threat to the ability of local officials

across the country to deal creatively (and effectively) with their own local educational challenges.

Perhaps most importantly, this Court's intervention is needed to put an end to the federal judiciary's eight-year reign over Arizona's schools. Arizona needs this Court's help to return control over the funding of Arizona's school programs to where it rightly belongs—out of the hands of a single federal district court judge and back into the hands of Arizona's democratically accountable officials.

OPINIONS BELOW

The opinion of the court of appeals is reported at 516 F.3d 1140, and reprinted in the appendix at Pet. App. 1a. The district court's order denying relief under Federal Rule of Civil Procedure 60(b) is reported at 480 F. Supp. 2d 1157, and reprinted at Pet. App. 96a. The district court's order finding violations of the Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701 *et seq.*, is reported at 172 F. Supp. 2d 1225, and reprinted at Pet. App. 117a.

JURISDICTION

The court of appeals rendered its decision on February 22, 2008, and denied a timely petition for rehearing and rehearing en banc on April 17, 2008. Pet. App. 92a. On July 11, 2008, Justice Kennedy extended the time for filing this petition to and including September 1, 2008. (Because September 1, 2008 is a legal holiday under 5 U.S.C. § 6103, the time for filing is extended to and including

September 2, 2008. *See* S. Ct. R. 30.1.) The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Title 20, section 1703 of the United States Code, codifying the Equal Educational Opportunity Act of 1974, provides in pertinent part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ...
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The pertinent parts of Title 20, sections 6301 *et seq.* of the United States Code, codifying the No Child Left Behind Act of 2001, are reprinted at Pet. App. 193a.

The pertinent parts of Arizona House Bill 2064, codified as Arizona Revised Statutes, sections 15-756 *et seq.*, are reprinted at Pet. App. 268a.

Rule 60(b) of the Federal Rules of Civil Procedure is set forth in its entirety at Pet. App. 335a.

STATEMENT OF THE CASE

This case has drawn the federal judiciary into the center of a long-running, highly politicized debate among Arizona's citizens and local officials over how best to run Arizona's schools and, in particular, how to structure (and fund) Arizona's programs for teaching English to students as a second language. One side of the debate maintains that, to ensure equal educational opportunities, funding earmarked for English-language-learner ("ELL") programs must be substantially increased. In contrast, a different side of the debate is concerned that ELL funding is not being employed productively, and seeks to ensure equal educational opportunities by requiring greater accountability for the considerable funding already provided to Arizona's schools.

Against this backdrop, the Arizona Legislature has enacted laws designed to increase efficiency, avoid unnecessary waste, and improve overall student performance. Successful reforms have focused on invigorating local school management, improving teacher quality, cutting unnecessary costs, eliminating shortages in instructional materials, and reducing class size through innovative policies. Although more than doubling ELL funding and substantially expanding overall school funding (which school districts may use for ELL instruction), the Legislature has rejected calls for dramatic, one-size-fits-all increases in funding for ELL programs. Instead, the people's elected representatives have sought to tie ELL funding to the actual costs incurred by individual school districts in teaching English to students.

Moreover, because ELL funding is provided based on the number of students participating in ELL programs—not the number of students who become proficient in English—the Legislature has passed carefully structured legislation, such as the recent H.B. 2064, that holds schools accountable and avoids perverse incentives for keeping students languishing in special-language programs. Under H.B. 2064, Arizona's schools will receive $444 in funding for each and every ELL student in addition to approximately $7,400 per student in general funding. To the extent this funding is inadequate for any particular school district, the Legislature has established a specially-structured English-immersion fund that will cover the incremental costs of teaching English to students. In the Legislature's judgment, this approach is more than sufficient to satisfy the State's obligation to provide students with equal educational opportunities.

Respondents, supported by Arizona's Governor, have opposed many of the Legislature's attempted reforms. Instead, Respondents have pressed for dramatic increases in the amount of funds earmarked for ELL instruction on a state-wide basis. *See* Robert Rob, *GOP Must Keep Fighting on English-Learner Issue*, The Arizona Republic, Aug. 14, 2005 (Arizona's Governor has proposed that ELL students should receive an additional $1,289 per year in state funding). In their view, Arizona's educational successes will be "fleeting at best" unless the State commits substantially more taxpayer dollars to ELL instruction, without performance requirements or timetables for ELL

students to achieve English proficiency. Pet. App. 100a.

Taking sides in this policy debate, the district court anointed itself overseer of Arizona's public schools and enmeshed the federal judiciary in enduringly sensitive questions of local educational policy. *See* Chip Scutari, *Judge Gives Napolitano Victory With Ruling on English-learners*, The Arizona Republic, Jan. 27, 2006; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (noting "major" controversy over "the extent to which there is a demonstrable correlation between educational expenditures and the quality of education"). This case, which began 16 years ago as a declaratory judgment action concerning the adequacy of ELL instruction in a single school district on the Mexican border, has morphed into a state-wide injunction against Arizona's officials. Specifically, a federal judge has ordered Arizona's Legislature, on threat of daily multi-million-dollar penalties, to enact legislation adopting Respondents' preferred policy outcomes by substantially increasing ELL funding. The Legislature emphatically disagrees with those policy choices, but finds itself cabined by the equitable powers of the Article III branch. That should not be.

A. The 1992 Lawsuit

1. The city of Nogales, adjacent to Heroica Nogales in Sonora, Mexico, is Arizona's largest border town. The Nogales Unified School District has six elementary schools, two middle schools, one high school, and an alternative high school. Pet.

App. 6a. Nearly all of Nogales's student population is Hispanic or Latino. *See id.* The Census Bureau estimates that 93 percent of Nogales's population (20,878 people) speak a language other than English at home. As of 2006, approximately 30 percent of Nogales's students were enrolled as English-language-learners, with some 60 percent having previously participated in ELL programs. *See id.*

In 1992, certain Nogales students and their parents filed a class action lawsuit against the State of Arizona, the Superintendent of Public Instruction, and individual officials of the Arizona State Board of Education. The plaintiffs alleged violations of the Equal Educational Opportunities Act of 1974 ("EEOA"), and sought declaratory relief. The Act's section 1703(f) provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by" failing "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). Invoking this provision, the plaintiffs contended that Arizona officials were not taking "appropriate action" to educate Nogales's non-English speaking schoolchildren.

2. After lengthy pre-trial proceedings and a three-day bench trial, the district court entered an order on January 24, 2000, granting declaratory relief. The court held that defendants were violating the EEOA's "appropriate action" requirement. In the court's view, although the State's programs were based on sound educational

theory, the State "failed to follow through with practices, resources and personnel necessary to transform the theory into reality." Pet. App. 151a. The court expressed particular concern that funding earmarked for ELL programs did not cover the cost of ELL instruction Pet. App. 149a-150a. And it found that Nogales's bilingual-education programs were deficient in six respects: (1) too many students in a classroom; (2) not enough classrooms; (3) not enough qualified teachers; (4) not enough teacher aids; (5) inadequate tutoring programs; and (6) insufficient teaching materials. *See id.*

The named defendants declined to appeal. They also entered into a consent decree, resolving plaintiffs' claims with respect to the evaluation and monitoring of students, tutoring and other compensatory instruction, and the structure of English language curriculum. Pet App. 10a. The district court approved the consent decree on July 30, 2000. *See id.*

3. In the wake of the district court's declaratory judgment, the Arizona Legislature has sought to address the district court's concerns and escape the federal judiciary's supervision of Arizona's public schools. Reforms enacted by the Legislature have made Arizona's schools, in many respects, a model of success for English-language programs. Yet, notwithstanding significant increases in overall funding, and substantial measures taken to address deficiencies identified in the court's initial order, none of those efforts have satisfied the district court. Instead, the court has steadily extended its reach over Arizona's schools.

On June 25, 2001, even though the class was certified to include only students from Nogales Unified School District, the district court granted injunctive relief on a statewide basis. More recently, extending the litigation beyond the named defendants, the trial court ordered the Arizona Legislature to increase incremental funding earmarked solely for ELL programs or face the prospect of fines up to $2 million per day. Pet. App. 173a-174a.

B. No Child Left Behind Act

Over the last eight years, the legal and policy landscape has dramatically changed. The upshot is that the district court's orders are imposing requirements on Arizona's schools that are significantly out of step with current federal educational policies and requirements.

1. Congress comprehensively restructured federal education funding requirements in the No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. § 6301, *et seq.* NCLB is designed to improve state and local education standards with the goal that all students achieve proficiency in reading and math by 2014. The statute, which has been characterized as "the largest federal intrusion into the educational affairs of the states in the history of this country," Sam Dillon, *Thousands of Schools May Run Afoul of New Law*, N.Y. Times, Feb. 16, 2003, § 1 (National), at 33 (quoting Paul Houston, Executive Director of American Association of School Administrators), recognizes that additional federal funding will not improve school quality unless it is used efficiently and schools are held

accountable. Pet. App. 256a-258a (20 U.S.C. § 6812). To further accountability, NCLB establishes procedures for measuring student proficiency and compiling detailed information on the educational performance of States and local school districts. Pet. App. 193a-234a (20 U.S.C. § 6311).

2. NCLB is not mandatory—States may "opt out" and elect to forgo federal education funding. If a State accepts NCLB funding, however, it must develop a compliance plan that (i) includes an "accountability system," and (ii) requires its schools to implement "assessments" (*e.g.*, administer standardized tests) of student skills in each grade. Pet. App. 196a (20 U.S.C. § 6311(b)(2)(A)). The test results are used to hold local agencies and schools accountable by determining whether schools have made "academic yearly progress" towards meeting certain proficiency standards. *Id.* Within these parameters, NCLB leaves States broad discretion to develop their own individualized plans for educating students.

Congress vested the Department of Education with authority in the first instance to determine whether state compliance plans satisfy federal requirements. States must, accordingly, report their compliance plans to the Department of Education, which has authority to reject all or part of a State's federal education funding. Pet. App. 193a, 221a (20 U.S.C. § 6311(a), (g)). Schools that fail to make adequate annual progress toward satisfying federal proficiency standards are subject to escalating sanctions. Pet. App. 235a-254a (20 U.S.C. § 6316(b)). If a school fails to make

satisfactory progress in four consecutive years, then the local educational agency must either (i) replace "all or most of the school staff" and turn operations over to a private management company, or (ii) surrender control to state government. Pet. App. 249a-251a (20 U.S.C.§ 6316(b)(8)).

3. Most relevantly, NCLB establishes detailed requirements for state English-language instruction and programs. Incorporating provisions from the Bilingual Education Act of 1968, NCLB's Title III—known as the "English Language Acquisition, Language Enhancement, and Academic Achievement Act," 20 U.S.C. § 6811—is designed to hold schools and state and local educational agencies accountable for the academic progress of ELL students. Pet. App. 257a (20 U.S.C. § 6812(8)). Like NCLB's other provisions, Title III reflects Congress's decision to shift the emphasis of federal education policy away from funding and toward accountability and results. *See* 147 Cong. Rec. 13322 (Dec. 17, 2001) (statement of Sen. Carper).

Title III's requirements are, in a word, extensive. Every school receiving a Title III sub-grant must biennially evaluate its ELL program. The evaluation must provide "a description of the progress made by children in learning the English language and meeting challenging state academic content and student achievement standards." Pet. App. 263a (20 U.S.C. § 6841(a)). Schools are obliged to monitor students and track their achievement "for each of the 2 years after" they depart the ELL program. *Id.* In addition, schools must set "annual measurable achievement

objectives" that accurately measure, among other things, a child's "development and attainment of English proficiency." Pet. App. 263a (20 U.S.C. § 6842(a)(2)). These measurable objectives require annual increases in the percentage of children making progress toward and attaining English proficiency. *Id.* (20 U.S.C. § 6842(a)(3)(A)).

Failure to meet Title III's standards requires a school to jettison ineffective programs. If a school fails to attain satisfactory progress for two consecutive years, the school must develop an "improvement plan" and obtain "technical assistance" from the State. Pet. App. 265a-267a (20 U.S.C. § 6842(b)). If a school fails for four consecutive years, the State must either overhaul the school's ELL curriculum or replace all its personnel. Pet. App. 266a-267a (20 U.S.C. § 6842(b)(4)).

C. Arizona's English Language Programs

In the last eight years, Arizona has implemented significant changes in its English-learning funding, curriculum, and protocols. Pet App. 30a-31a. These changes have appreciably increased funding available for ELL instruction and significantly altered how Arizona runs its ELL programs.

1. In November 2000, Arizona's voters passed Proposition 203, requiring (i) all classes in Arizona's public schools to be taught in English; and (ii) ELL students to be educated in separate, structured immersion classes until they are proficient in English. Pet. App. 369a-379a. Whereas traditional bilingual-education programs

taught substantive content (such as math and science) in students' native languages, Proposition 203 mandates that ELL students be taught in English tailored to a level they can understand.

2. Apart from restructuring how ELL students are taught, Arizona has significantly increased the funding available for ELL instruction. In December 2001, the Arizona Legislature passed H.B. 2010, doubling the funding each district receives per ELL student and further appropriating money for ELL instruction materials, teacher training, compensatory education, and reclassification. Pet. App. 380a-428a. Arizona also greatly increased its basic school funding packages. Pet. App. 31a. Proposition 301, approved by the voters in 2000, increased the state sales tax by six tenths of a percent to fund increased base-teacher salaries, teacher-performance pay, and tutoring programs for underperforming students. Pet. App. 358a-361a. Similarly, Arizona's voters approved measures ensuring that a portion of all Indian gaming proceeds will be channeled to Arizona's schools. Pet. App. 361a.

As a result of these initiatives, support for overall education has grown from an inflation-adjusted $3,139 per pupil in 2000 to an estimated $3,570 in 2006. Pet. App. 29a. The difference is even more pronounced when taking into account local funding, which rose from $5,677 per pupil in 2000 to $6,412 in 2006. *Id.* Federal funding has likewise increased, from $526 per pupil in 2000 to about $953 in 2006. *Id.* If H.B. 2064 is allowed to take full effect, funding will increase even more.

The monies available to Nogales Unified School District have likewise expanded. In 2000, Nogales voters agreed to increase property taxes to be used for any educational purpose. Pet. App. 430a-431a. The proceeds flowing directly to Nogales Unified School District grew from $895,891 in FY2001 to over $1.6 million in FY2007. Pet. App. 431a. In fact, in FY2006 Nogales Unified School District carried a budget *surplus* of over $1.3 million.

3. In addition to significantly increasing funding, Arizona has implemented statewide measures designed to enhance ELL instruction. Arizona's English-immersion instructors are required to complete an extensive curriculum to obtain provisional and full endorsements to ensure effective instruction. The State's English Acquisition Services department has grown from six members to sixteen; in addition, H.B. 2064 provides for the hiring of twenty more professionals. Pet. App. 336a-339a. Indeed, Arizona's English Language Proficiency Standards, adopted in 2004, have been recognized by one state official as going from "zero to ten" in providing a benchmark for measuring English proficiency. Pet. App. 339a-340a.

4. Perhaps most importantly, schools are held accountable for ELL students' performance. To fulfill their evaluation mandate, schools are required to employ the Arizona English Language Learner Assessment, and submit annual reports identifying the rate at which their ELL students are achieving English proficiency. Pet. App. 341a-343a. The State's Department of Education has taken an active role in monitoring and working

with individual districts to organize ELL classrooms, arrange class composition, and determine criteria for determining when ELL students should be transferred to mainstream classes. Pet. App. 354a-355a. Department-developed English Language Proficiency Standards provide ELL teachers with reading and writing performance targets. Moreover, through Arizona's English Acquisition Services Program, the Department conducts several dozen site visits each year, hosts annual seminars on innovative ELL teaching methods, and holds monthly meetings with ELL teachers. Monitoring programs that did not exist in 2000 have been effectively implemented to track the day-to-day progress of ELL students. Pet. App. 351a-354a.

5. Working with local officials, Arizona has substantially improved Nogales's ELL programs. The benefits of reduced class sizes, higher-quality teachers, an impressive tutoring program, and comprehensive instruction materials have borne objective, measurable results. For instance, the Arizona Department of Education has ranked 628 schools (each with more than 100 ELL students enrolled) according to student performance on the standardized Arizona Instrument to Measure Skills test used to measure whether students are meeting Arizona's minimum academic standards. Pet. App. 361a-365a. Nogales had *four* schools within the top ten, and *five* within the top 50. Pet. App. 365a.

D. The Proceedings Below

1. Notwithstanding significant structural changes in Arizona's ELL programs and

substantial increases in educational funding, the district court ruled in December 2005 that Arizona was not adequately funding its ELL programs by virtue of the fact that it had not earmarked sufficient funds to cover all the costs of ELL instruction. The court then imposed fines that would continue until Arizona substantially increased ELL funding. Pet. App. 173a-174a. The court gave Arizona's Legislature 15 days from the beginning of the legislative session to comply with its order. If the Legislature failed to enact legislation to the court's satisfaction, then the State would face fines of $500,000 per day (over time increasing to $2 million per day). *See id.*

2. After significant negotiation and fact-finding, the Arizona legislature enacted H.B. 2064. H.B. 2064 implemented funding increases of roughly $14 million in what is referred to as "group B" funding (the additional funds a school directly receives for each student in an ELL program); $10 million to fund local ELL programs; and another $7 million to assess student progress and provide ELL materials. Pet. App. 268a. In addition, the statute established a statewide compensatory instruction fund, and a specific fund for structured-English-immersion, which would cover school districts' incremental costs of ELL instruction beyond that covered by "group B" funds.

H.B. 2064's provisions concerning "group B" funding were to take effect after the district court's confirmation that Arizona had taken "appropriate action" under the EEOA. Arizona Governor Napolitano, who had vetoed three earlier legislative attempts to respond to the district court's contempt

orders, allowed H.B. 2064 to become law without her signature. Pet. App. 26a. Because the district court's December 2005 order (for the first time) commanded the Legislature to take action, and because Petitioners were concerned that the named defendants were not adequately protecting the State's interests (in fact, the named defendants had stated their support for the district court's injunction), Petitioners intervened in March 2006. Along with the Superintendent of Public Instruction, Petitioners moved (i) to purge the contempt, and (ii) for relief from judgment under Federal Rule of Civil Procedure 60(b)(5). Pet. App. 28a.

3. On April 25, 2006, the district court ruled that H.B. 2064 did not comply with its prior orders because, in the court's view, the legislation did not sufficiently fund ELL education. Pet. App. 27a. Petitioners appealed. In an unpublished memorandum decision, the court of appeals vacated both orders, noting that "the landscape of educational funding has changed significantly" since 2000, and remanded for the district court to hold an evidentiary hearing on whether changed circumstances "had a bearing on the appropriate remedy." Pet. App. 190a.

4. On remand, the district court acknowledged NCLB's dramatic effect on federal and local education policy. The court recognized that, by "increasing the standards of accountability," NCLB "has to some extent significantly changed State educators' approach to educating students in Arizona." Pet. App. 101a. The court likewise found that the State's Department of Education had

taken seriously its role both in creating standards and norms and in overseeing Arizona's ELL programs. Pet. App. 95a-100a. The court acknowledged that "[t]here is no doubt" the Nogales school district "is doing substantially better than it was in 2000." Pet. App. 99a.

The court nonetheless found the "strides made by" Nogales were "largely" a result of its own "efforts alone." Pet. App. 100a. The court held that the significant improvements in the quality of education did "not establish that Arizona is fulfilling its duty to fund ELL programming rationally." Pet. App. 46a. In addition, the court denied Petitioners' Rule 60(b)(5) motion. Pet. App. 115a. In the court's view, Arizona's "minimum funding level for ELL programs ... bore no rational relation to the actual funding needed to insure that ELL students could achieve mastery of the State's academic standards." Pet. App. 116a. The court further held that H.B. 2064 violated federal law because it purportedly used federal funds to "supplant" rather than "supplement" state monies. Pet. App. 113a-114a. And it determined that the Legislature's decision to provide incentives for schools to teach students English within two years was unreasonable. Pet. App. 114a-115a.

5. Upon Petitioners' appeal, the Ninth Circuit affirmed. Pet. App. 91a. Instead of determining whether the district court's orders were appropriate in view of dramatic changes in federal requirements, the court of appeals applied a highly deferential standard of review. Even though Petitioners were seeking relief in the broader public interest, and even though it is undisputed that the

named defendants wanted the injunction to remain in place, the Ninth Circuit deemed it improper to grant "relief from judgment on grounds that could have been raised on appeal" from the district court's prior orders. Pet. App. 60a.

According to the court of appeals, to obtain relief under Rule 60(b), Petitioners were required to show that the "basic factual premises of the district court's central incremental funding determination had been swept away, or that there has been some change in legal landscape that makes the original ruling now improper." Pet. App. 63a. The court emphasized that it is not sufficient "to argue for vacating the judgment because of factual or legal circumstances that have not changed the basic premises of the original rulings." *Id.* Instead, the court below required Petitioners "to demonstrate either that there are no longer incremental costs associated with ELL programs in Arizona" or that Arizona had altered its funding model. *Id.*

Measured against that strict standard, the court of appeals found that the "basic premise" of the district court's 2000 orders—"ELL students need extra help and that costs extra money"—had not been "swept away." Pet. App. 64a. It interpreted the "recent statewide program to *improve* ELL testing, monitoring, and support programs" as factors weighing *against* a finding of changed factual circumstances, inasmuch as those programs would impose "incremental costs on school districts." *Id.* (emphasis added). And it rejected Petitioners' argument that focusing solely on ELL-specific funding "is no longer appropriate

given general increases in education funding since 2000." Pet. App. 67a.

Finally, the court of appeals concluded that Arizona's compliance with NCLB's standards and requirements did not satisfy the EEOA's "appropriate action" requirement. Pet. App. 72a-81a. Rather than attempting to harmonize the two statutes, the court below focused on the supposed differences in the statutes' legislative purposes, and concluded that compliance with NCLB was not sufficient to satisfy the EEOA's "appropriate action" requirement because NCLB did not repeal or pre-empt the EEOA. Pet. App. 75a-80a.

The court of appeals denied a timely petition for rehearing and rehearing en banc on April 17, 2008. Pet. App. 92a. This petition follows.

REASONS FOR GRANTING THE PETITION

The Court should grant *certiorari* for three reasons. *First*, the Ninth Circuit's decision conflicts with decisions of other courts of appeals and cannot be squared with this Court's decisions concerning the proper role of federal courts in the context of institutional reform litigation. *Second*, this Court's intervention is required to correct the Ninth Circuit's setting aside of congressional policy and intrusion into traditional prerogatives of local state officials in establishing educational policies and priorities. *Third*, the questions presented address an important, recurring issue of federal law. If left uncorrected, the decision below threatens to undermine local officials' freedom to deal creatively and effectively with local educational challenges.

I. The Ninth Circuit's Decision Conflicts With Decisions From Other Courts Of Appeals And Contravenes This Court's Settled Precedents.

Institutional reform litigation poses significant risks that federal courts will be induced to step outside the traditional judicial role and exercise equitable authority to "assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make." *Lewis v. Casey*, 518 U.S. 343, 385 (1996) (Thomas, J., concurring). This Court has accordingly held that, in the context of institutional reform litigation, the standard for dissolving a federal injunction is a "flexible" one. *See Frew v. Hawkins*, 540 U.S. 431 (2004); *Board of Educ. of Oklahoma City Pub. Schs. v. Dowell*, 498 U.S. 237 (1991). The Ninth Circuit's decision fails to apply the proper standards. In doing so, the decision below creates an irreconcilable conflict with decisions from other courts of appeals.

A. The Ninth Circuit's Decision Conflicts With Decisions From Other Courts Of Appeals.

Federal Rule of Civil Procedure 60(b) permits parties to seek relief from a federal court decree "on such terms as are just" if the application of the decree "prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385, 393 (1992). Applying Rule 60(b), the court below required a showing either "that the basic factual premises of the district court's central incremental funding determination had been swept away," or that there

was "some change in the legal landscape that makes the original ruling now improper." Pet. App. 63a. The court of appeals held that the district court's declaratory judgment and injunction could be modified only if shifts in "factual or legal circumstances" have "changed the basic premises of the original rulings." *Id.* Rejecting an approach adopted by the Sixth Circuit, the court below expressly declined to address whether the "original decree" could have been "issued on the state of facts that now exists." Pet. App. 51a n.31.

In addition to narrowly defining the Rule 60(b) standard, the court of appeals held that it would not grant "relief from judgment on grounds that could have been raised on appeal" from the district court's judgment and "earlier injunctive orders but were not." Pet. App. 60a. In other words, because the named defendants failed to appeal the district court's initial orders, the court below determined that the State had effectively consented to be bound by the earlier rulings. Pet. App. 52a.

This approach directly conflicts with that articulated in decisions of other courts of appeals, including those of the Sixth, Seventh, and Eleventh Circuits. These other courts have held that Rule 60(b)'s standards should be applied flexibly, and that a judicial decree should be modified or dissolved whenever continued enforcement of the decree is detrimental to the broader public interest. These courts have rejected the suggestion that a court's legal rulings underlying a judgment are not subject to change under Rule 60(b) merely because the parties have consented.

The Eleventh Circuit, for example, has recognized that a flexible approach is "often essential to achieving the goals" of institutional reform litigation and, indeed, the need for flexibility "can be especially apparent ... where efforts to implement the decree have been bogged down for years." *Reynolds v. McInnes*, 338 F.3d 1221, 1226 (11th Cir. 2003). In contrast to the Ninth Circuit's approach, the Eleventh Circuit has held that continued compliance with the technical terms of a decree is not required; instead, a court presented with a Rule 60(b) motion must examine the decree's "basic purposes." *Id.* If a party subject to a decree is able to accomplish the decree's basic purpose through alternative means, then modification is warranted. *Id.* Rejecting an argument closely akin to the approach embraced below, the Eleventh Circuit held that "evidence of the circumstances as they existed at the time the parties agreed to the decree" is not required. *Id.* at 1228; *cf.* Pet. App. 63a (requiring that "basic factual premises" of original decree must be "swept away"). To the contrary, the fact that a decree has "proven to be unworkable is itself a significant change in circumstances" that may warrant modification. *Reynolds*, 338 F.2d at 1228-29.

So too, as the Ninth Circuit itself recognized, the decision below squarely conflicts with decisions from the Sixth Circuit. Pet. App. 51a n.31. In the Sixth Circuit, to modify a decree in institutional reform litigation, a party "need only identify a defect or deficiency" in the original decree that "impedes achieving its goal." *Heath v. DeCourcy*, 888 F.2d 1105, 1110 (6th Cir. 1989). Rather than

refusing to consider the "basic legal conclusions" that prompted the original injunction, the Sixth Circuit approaches Rule 60(b) motions with a "free hand." *Id.* at 1109. The Sixth Circuit has thus held that a "party should be entitled to modification whenever the original decree could not properly have been issued on the state of facts that now exists." *In re Detroit Dealers Ass'n*, 84 F.3d 787, 790 (6th Cir. 1996).

Finally, the Ninth Circuit's decision cannot be squared with decisions of other courts of appeals holding that, under a court-imposed injunction, a party "can only be required to address ongoing illegal activity or the past effects of illegal activity"—that is, continuing "violations of substantive federal law." *Alexander v. Britt*, 89 F.3d 194, 199-200 (4th Cir. 1996).

The Seventh Circuit emphasized this fundamental point in a case, analogous to this one, where a court-ordered injunction entangled "an arm of the federal government in the administration of another sovereign, monitoring the budgetary decisions of a Mayor and City Council" of Chicago. *Evans v. City of Chicago*, 10 F.3d 474, 477-79 (7th Cir. 1993). In those circumstances, the Seventh Circuit held that to justify continued enforcement of such an injunction, there must be a "substantial federal claim, not only when the decree is entered but also when it is enforced." *Id.*; *see also O'Sullivan v. City of Chicago*, 396 F.3d 843, 862-865 (7th Cir. 2005). A continuing violation of federal law—not simply a violation of the decree itself—is required because "courts are bound by principles of federalism (and

by the fundamental differences between judicial and political branches of government) to preserve the maximum leeway for democratic governance." *Evans*, 10 F.3d at 479; *see also id.* (recognizing that doubts should be "resolved in favor of leeway for the political branches").

Significantly, in recognizing the important federalism principles at stake, the Seventh Circuit rejected the suggestion that the Rule 60(b) analysis turns on whether state officials somehow consent to an injunction. "Consent," whether express (in the form of a consent decree) or implied (because state officials failed to appeal the district court's initial judgment and have since expressed their support for the judgment) is not dispositive. To the contrary, "entry and continued" enforcement of an injunction "regulating the operation of a governmental body depend on the existence of a substantial claim under federal law." *Id.* at 480. If there is no continuing violation of federal law, then the injunction cannot properly be enforced. *Id.*

B. The Ninth Circuit's Decision Conflicts With This Court's Controlling Authorities.

In addition to conflicting with decisions from other courts of appeals, the decision below contravenes this Court's controlling authorities.

This Court has held that, in reviewing requests for relief under Rule 60(b), a court should apply a "flexible standard," ordering a decree dissolved or modified if continued "enforcement of the decree ... would be detrimental to the public interest," *Rufo*, 502 U.S. at 385, 393, or "if the circumstances,

whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *System Fed'n No. 91, Ry. Employees' Dep't v. Wright*, 364 U.S. 642, 647 (1961). This requisite "flexibility" is especially appropriate in the context of institutional reform litigation where, as here, a federal court's injunction interferes with local officials' control over local institutions. *See Rufo*, 502 U.S. at 392 n.14. A federal court that has employed its equitable powers to redress violations of federal statutory requirements must remain appropriately sensitive to changes in either law or factual circumstances. Flexibility is required because "such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" *Rufo*, 502 U.S. at 381.

Instead of the "flexible" approach mandated by this Court's authorities, the Ninth Circuit applied a nigh-insurmountable burden for modifying the district court's eight-year-old injunction. In this respect, the Ninth Circuit's decision echoes the daunting standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932), requiring that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" is sufficient to justify modifying a decree. *Id.* at 119.

Specifically, the court of appeals refused to consider whether dissolving the injunction was appropriate in the broader public interest. Focusing narrowly on the question whether ELL-program costs in Arizona exceed ELL-specific funding, the court below declined to consider the original injunction's basic purpose—namely,

whether Arizona is engaged in continuing violations of federal law by failing to "take appropriate" action to "overcome language barriers" in view of substantial increases in overall educational funding. Pet. App. 67a. Instead of addressing this fundamental question, the Ninth Circuit held that using general base-level funds to equalize opportunities for ELL students is not "appropriate action" under the EEOA. Pet. App. 68a ("[d]iverting base level funds—thereby hurting all students in an attempt to equalize opportunities for ELL students—is not an 'appropriate' step"). And it ruled that the district court's "basic legal conclusion" not to take into account funding sources other than the funding specifically earmarked for ELL programs could not be revisited in the context of a Rule 60(b) motion.

The Ninth Circuit's procrustean approach is directly at odds with this Court's decisions. *See Oklahoma City*, 498 U.S. at 247 (*Swift*'s standard does not apply in the context of institutional reform litigation). Had it applied a "flexible" standard (and properly considered the broader public interest), the Ninth Circuit would have been forced to grapple with the pivotal fact that an injunction exceeds "appropriate limits" if it is "aimed at eliminating a condition that does not violate" federal law or "flow from such violation." *Oklahoma City*, 498 U.S. at 247. In other words, the violation to be redressed must be a continuing violation of federal law, not a continuing violation of the decree itself. *See Frew*, 540 U.S. at 442.

The Court reaffirmed these foundational principles in *Frew*. Writing for a unanimous Court,

Justice Kennedy emphasized that if a federal injunction is not strictly "limited to reasonable and necessary implementations of federal law," it may "improperly deprive future officials of their designated legislative and executive powers." *Id.* at 441. Accordingly, "principles of federalism require that state officials"—those with "front-line responsibility" for administering state programs in compliance with federal law—be "given latitude and substantial discretion." *Id.* at 442. *Frew* recognized that a State depends on "successor officials ... to bring new insights and solutions to problems of allocating revenues and resources." *Id.* And it acknowledged that, although "the basic obligations of federal law may remain the same," the "precise manner of their discharge may not." *Id.* Accordingly, if a State "establishes reason to modify" a judicial decree, "the court should make the necessary changes." *Id.*

In light of this Court's authorities, the Ninth Circuit should have recognized that, because Petitioners provided numerous reasons for modifying the district court's eight-year-old injunction, the district court was duty bound to make necessary changes to its existing injunction and judgment. Most importantly, the court below should have recognized that Arizona's officials are entitled to broad leeway in determining the "precise manner" for complying with the EEOA's "appropriate action" requirement, and that dramatically increasing statewide ELL-specific funding, regardless of an individual district's funding needs, is not the only permissible approach

for affording equal educational opportunities to Arizona's ELL students.

II. The Ninth Circuit's Decision Conflicts With Congress's Policy Judgments In Enacting Comprehensive Educational Reform.

In addition to resolving the yawning gap between the Ninth Circuit's approach and that of other courts of appeals, the Court should grant review to vindicate important congressional policies and arrest the Ninth Circuit's improper foray into policymaking.

The Ninth Circuit's decision turns on the premise that the EEOA's mandate that States take "appropriate action" to overcome language barriers requires state legislatures to provide substantial funding earmarked for ELL programs. Accordingly, the appropriateness of a State's funding decisions are to be assessed not in light of the State's compliance with NCLB's detailed requirements, but rather by a chancellor's-foot judgment as to what measures are necessary to obtain "immediate equalization of educational opportunities" for ELL students. Pet. App. 74a. The decision below imposes an extra-judicial gloss that fundamentally undermines Congress's comprehensive education reform efforts embodied in NCLB.

The EEOA itself offers no express guidance as to what constitutes "appropriate action." 20 U.S.C. § 1703(f). But, as courts have recognized, Congress enacted the EEOA at the same time it amended the Bilingual Education Act. The two measures were

fashioned together as part of the 1974 amendments to the Elementary and Secondary Education Act. *See Castaneda v. Pickard*, 648 F.2d 981, 1009 (5th Cir. 1981). It is therefore significant that NCLB's Title III incorporated the Bilingual Education Act and, with revisions, renamed it the "English Language Acquisition, Language Enhancement, and Academic Achievement Act." Pet. App. 255a (20 U.S.C. § 6311); *see Castaneda*, 648 F.2d at 1009 (recognizing that the Bilingual Act is relevant to interpreting the EEOA).

Title III's detailed requirements should inform EEOA's interpretation by setting a benchmark for "appropriate action" under federal law. In particular, Title III sets out specific (and comprehensive) standards for holding state and local educational agencies accountable for adequate yearly progress of ELL students. Pet. App. 257a(20 U.S.C. § 6812(8)). It requires schools to set "annual measurable achievement objectives" for ELL students that accurately measure their "development and attainment of English proficiency." Pet. App. 263a ((20 U.S.C. § 6842(a)(1), (a)(2)). If progress is not achieved, Title III imposes strict sanctions. *Id.* Title III thus reflects Congress's considered judgment that States are to retain flexibility in developing their own plans for implementing ELL programs, provided that they comply with NCLB's requirements.

Congress's judgment should have been determinative. Instead, dismissing NCLB as a "gradual improvement plan," the court of appeals held that the EEOA demands "objective, immediate equalization of educational opportunities for each"

and every ELL student. Pet. App. 74a; *see also id.* (NCLB "does not deal in the immediate, rights-based framework inherent in civil rights law"). The court below thus held that NCLB's comprehensive requirements do not control what counts as "appropriate action" under the EEOA because the two statutes serve "distinct purposes." Pet. App. 72a-73a. In the Ninth Circuit's view, interpreting the EEOA's "appropriate action" requirement in light of NCLB would "effectively repeal the EEOA by replacing its equality-based framework with a gradual remedial framework of NCLB." Pet. App. 76a.

In so ruling, the Ninth Circuit substituted its policy preferences for those of Congress. Nothing in section 1703(f) sets "immediate equalization of educational opportunities" as an objective. To the contrary, unlike EEOA provisions flatly prohibiting "deliberate segregation" and racial "discrimination," 20 U.S.C. §§ 1703(a), (d), section 1703(f) contemplates a different approach. The statutory language—requiring "appropriate action" to "overcome" language barriers—suggests that the struggle for equal educational opportunities is not expected to yield complete (and immediate) success. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (statutory construction should "begin with the language employed by Congress"). The statute, in short, is not a rigid mandate; instead, it requires schools to make "a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." *Castaneda*, 648 F.2d at 1009.

The Ninth Circuit's contrary approach drives an unwarranted (and unnecessary) wedge between the EEOA and NCLB. The two statutes, dealing with the same subject matter, are readily interpreted as a coherent whole. Moreover, contrary to the Ninth Circuit's approach, a "[r]epeal by implication of an express statutory text" is not the same as a "repeal by implication of a legal disposition implied by a statutory text." *United States v. Fausto*, 484 U.S. 439, 453 (1988). The "task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *Id.* Here, inasmuch as Congress left the pivotal term "appropriate action" undefined, it filled that gap when it enacted comprehensive education reform in NCLB.

Nor are NCLB's requirements inconsistent with the EEOA's broader civil-rights objectives. To the contrary, Title III's express goals make clear that NLCB and the EEOA have a similar focus and serve complementary purposes. Pet. App. 256a-258a (20 U.S.C. § 6812). NCLB defines the federal requirements that States receiving federal funding must follow to ensure that ELL students are given the same opportunities as non-ELL students. NCLB is thus designed to ensure that "all limited English proficient children" receive assistance "to achieve at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." *Id*; *see also Not Getting Left*

Behind, Wash. Post, Feb. 5, 2006, at B-06 (quoting John Brattain, Chief Counsel for the Lawyers' Committee for Civil Rights Under Law, describing NCLB as the "greatest civil rights education statute that has ever been passed"). In short, NCLB should be construed to invigorate the EEOA by setting out clear, objective standards that state policymakers must follow to comply with federal requirements.

In failing to apply NCLB's standards as a benchmark for "appropriate action" under the EEOA, the Ninth Circuit violated the foundational principle that "legislative not judicial solutions are preferable" in areas where, as here, Congress has superior institutional competence. *Patsy v. Board of Regents*, 457 U.S. 496, 513 (1982). Moreover, in focusing narrowly on the EEOA's purpose of equalizing educational opportunities, the court below neglected Congress's objective of leaving "state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA." *Castaneda*, 648 F.2d at 1009. Indeed, where, as here, Congress has enacted comprehensive education reform, federal courts should be especially loath to enmesh themselves in prescribing "substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government (*i.e.*, state and local educational agencies)." *Id.*

III. The Ninth Circuit's Decision Raises Important Constitutional Issues That Should Be Resolved By This Court.

Apart from correcting the Ninth Circuit's doctrinal departures and improper exercise of judicial policymaking, this Court's review is needed to clarify the EEOA's requirements and to put an end to the lower courts' intrusions into Arizona's local institutions. By permitting the district court to micromanage Arizona's funding of ELL programs, the Ninth Circuit's decision, if allowed to stand, risks exposing States to a floodtide of federal litigation aimed at controlling local educational policies.

A. This Case Presents An Issue Of Exceptional National Importance.

Representing the fastest-growing segment of the school-age population, ELL students nationwide account for approximately 19 percent of all school-age children. *See* Kathleen Flynn & Jane Hill, *English Language Learners: A Growing Population*, Mid-Continent Research for Education and Learning (Dec. 2005), available at http://www.mcrel.org (last accessed Sept. 1, 2008). Five States—California, Texas, New York, Florida, and Illinois—currently account for 68 percent of all ELL elementary school students. *Id.* at 1. But, as immigration patterns evolve, ELL students and their families have begun moving to regions that are ill-equipped and inexperienced in educating ELL students. *Id.* at 2. For example, Nebraska experienced an exponential 350 percent increase in elementary-age ELL students from 1990-2000; Colorado, South Dakota, and Kansas similarly

witnessed increases exceeding 85 percent over the same period. *Id.*

Accordingly, as the number of ELL students grows, and as demands on state budgets expand, States will be increasingly forced to seek out innovative programs and policies that provide the highest quality education possible without unduly burdening taxpayers. Contrary to the assumptions indulged by the courts below, increased program funding is not necessarily the best path toward improving educational opportunities. *See* Williamson M. Evers & Paul Clopton, *High-Spending, Low-Performing School Districts*, in Courting Failure: How School Finance Lawsuits Exploit Judges' Good Intentions and Harm Our Children 158 (Eric A. Hanushek ed., 2006). As commentators have noted, "statistics that compare states' funding levels per student do not indicate conclusions about the quality of education provided, but rather indicate the efficiency of the system providing that education." *Arizona Ranks 11th in the Nation for Average Instructional Pay, 1st as Percent of Per Capita*, Arizona Tax Research Association, Newsletter, Vol. 67, No. 4 (May 2007). Accordingly, to achieve the goal of providing students with the "highest quality education possible while frugally spending taxpayers' dollars, ... a low price-per-student ratio should be lauded while other measures are consulted to evaluate the quality of education." *Id.*

For these reasons, States need guidance as to what is required to comply with the EEOA's "appropriate action" requirement. In particular, States, such as Arizona, need guidance as to what

actions in addition to complying with the detailed federal requirements in NCLB may be required to avoid federal court interference with local educational policy.

B. This Court's Intervention Is Required To Restore Local Control Over Arizona's Schools.

This Court should also grant certiorari to arrest what, under any measure, is an improper intrusion into the prerogatives of Arizona's officials and a disregard of important principles of federalism.

The Ninth Circuit's decision hinges in large part on its erroneous suggestion that "federalism concerns are substantially lessened" because "the state of Arizona and the state Board of Education wish the injunction to remain in place." Pet. App. 52a. But that position overlooks the real-world context in which this litigation has unfolded. By not vigorously defending against the litigation, the named defendants have won by losing. Indeed, the court's orders have allowed those officials to achieve policy outcomes otherwise not attainable through the democratic process.

In these circumstances, what the Ninth Circuit viewed as a palliative is in fact a poison. As Justice O'Connor noted, in the same year this litigation was launched, a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, 505 U.S. 144, 182 (1992). The fundamental "purpose served by our Government's federal structure" is not for the benefit of "public officials governing the States,"

but to secure liberty. *Id.* State officials "cannot consent to the enlargement" of federal powers beyond those enumerated in, and properly exercised under, the federal Constitution. *Id.*; *see also League of United Latin American Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (en banc) ("[c]onsent is not enough when [citizens] seek to grant themselves powers they do not hold outside of court").

As this Court has recognized, "powerful incentives" might lead state officials "to view departures from the federal structure to be in their personal interests." *New York*, 505 U.S. at 182; *see also United States v. City of Miami*, 2 F.3d 1497, 1507 (11th Cir. 1993) ("our experience teaches us that on some occasions public employers prefer the supervision of a federal court to confronting directly its employees and the public"). Here, for instance, some local officials—having failed to achieve additional funding increases through the legislative process—might welcome federal court involvement to bring about preferred policy outcomes.

Given these anti-democratic dynamics, the role for federal courts in enforcing the EEOA's "appropriate action" requirement should be circumspectly limited. Except in the most extraordinary circumstances (not present here), it is not appropriate for a federal court to order legislative action and then impose multi-million dollar fines when that judicially-ordained action is not forthcoming. It certainly is not appropriate for a federal court to impose its own policy judgments on States with respect to how local education should be funded and what constitutes adequate

funding. To the contrary, as this Court has long recognized, "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Oklahoma City*, 498 U.S. at 248. Local autonomy of "school districts is a vital national tradition." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977); *Bronx Household of Faith v. Board of Educ. of City of New York*, 331 F.3d 342, 368 (2d Cir. 2002) (noting the heretofore "unbroken tradition of federal court deference ... to democratically elected state and local governments in matters concerning education").

The Ninth Circuit's decision departs significantly from these fundamental precepts of our federal republic. It should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

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